73350-8

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Court of Appeals
Division I
State of Washington

NO. 73350-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

PETERSON BARZIE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. While the fact of a prior conviction cannot alone justify an exceptional sentence, the *nature* of the prior conviction may justify an exceptional sentence. Barzie abused his victim for years before the charged crime, leading to multiple domestic-violence convictions. Of those, three felony convictions counted as one point each on Barzie's offender score because they were prior felonies, but their nature as domestic-violence convictions for violating no-contact orders with the same victim was not part of the offender-score calculation. Was the jury entitled to draw on the nature of those convictions in determining the pattern-of-abuse aggravator?

2. An instructional error may be harmless. Here, the trial court gave the jury a pattern instruction defining "prolonged period of time" to mean "more than a few weeks" for the pattern-of-abuse sentencing aggravator. That pattern instruction has since been held to be an improper comment on the evidence that was prejudicial when the evidence established that abuse occurred just longer than a few weeks. Here, the evidence established that Barzie had been abusing the same victim for eight years. Was any error in providing the pattern instruction harmless?

3. The Washington Supreme Court has held repeatedly that the determination of whether an aggravating factor, as found by a jury, is sufficiently substantial and compelling to warrant an exceptional sentence is a legal conclusion properly made by the sentencing judge. In Barzie's case, the jury found the aggravating factor of a pattern of abuse in a domestic violence crime, and the judge then determined that the factor was sufficiently substantial and compelling to warrant an exceptional sentence. Was this proper?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Peterson Barzie was charged by amended information with three counts of felony harassment. CP 12-13. Counts 1 and 3 alleged that Barzie threatened to kill Onoya Okonda on October 18, 2014, and November 7, 2014. Id. Count 2 alleged that on November 7, 2014, Barzie, having been previously convicted of harassment against Amelia Sasu, threatened to kill Amelia Sasu. Id. Count 2 alleged that the offense was a crime of domestic violence, and further alleged the aggravating factor of being part of an ongoing pattern of psychological, physical or sexual abuse

manifested by multiple incidents over a prolonged period of time. Id.

A jury convicted Barzie of the lesser included offense of misdemeanor harassment in Count 1 and Felony Harassment as charged in Count 3. CP 95, 97, 137. For Count 2, the jury convicted Barzie of Felony Harassment as charged and found that it was a crime of domestic violence. CP 96, 99. The trial court then held a bifurcated trial on the issue of the pattern-of-abuse aggravated circumstance, and the jury found the aggravating factor. CP 100. 5RP 780-94.[1]

The trial court concluded that the aggravating circumstance was a substantial and compelling reason justifying an exceptional sentence, and imposed an exceptional sentence of 40 months. CP 110, 114. Barzie timely appealed. CP 121.

2. SUBSTANTIVE FACTS

Amelia Sasu, a single mother who grew up in New York, met Peterson Barzie in the spring of 2005 while visiting family in the Seattle area. 3RP 402, 406, 409. Barzie, a friend of the family, befriended Sasu by showing her the sights, and the two became

[1] The verbatim report of proceedings in this case is divided into five sequentially numbered volumes, which the State is referring to here as: 1RP (November 25, 2014; March 11, 2015; March 12, 2015); 2RP (March 12, 2015); 3RP (March 16, 2015); 4RP (March 17-18, 2015); 5RP (March 18-19, 2015; April 1, 2015).

romantic just before Sasu returned home to New York. 3RP 407-08. They talked on the phone almost daily, and then sometime mid-2006, Barzie moved to New York to live with Sasu and her two children. 3RP 409, 414.

At night, the couple liked to drink and listen to music, but then fights would often erupt. 3RP 410-11. One night in the summer of 2006, Barzie accused Sasu of cheating on him, and he hit her and choked her unconscious. 3RP 411-13.

Sasu moved to Seattle in August of 2007, and Barzie followed in January 2008. 3RP 415-16. One snowy winter night, the couple fought about going to a nightclub, and Barzie took Sasu's car keys. 3RP 418-19. Barzie pushed Sasu to the ground, and then stepped on her ankle, breaking it. 3RP 421. The next summer, the couple fought at a gas station about Sasu being with a girlfriend whom Barzie did not like. 3RP 422. Barzie choked and shoved Sasu and took her phone. 3RP 423. Sasu later testified that she was afraid of Barzie the entire time they were together. 3RP 424.

On another occasion, around 2009, the couple had broken up, but Barzie called Sasu and threatened that if he ever saw her with another man he would "beat the shit" out of her. 3RP 426-27.

That time, Sasu called the police. Id. Still, they reunited about six months later because Barzie claimed he found God and had changed. 3RP 428.

He hadn't. The next New Year's Eve, a man said hello to Sasu at a party, so Barzie accused her of sleeping with the man, and threatened her. 3RP 429. While Sasu was driving Barzie home on the freeway, he repeatedly punched her and pulled her hair. 3RP 430-31. Sasu suffered a black eye and a swollen lip. 3RP 432. Back at her apartment, a loud argument broke out between Barzie and Sasu's sister. 3RP 432. When the police came, Barzie hid in a closet in Sasu's apartment and Sasu refused to open the door. 3RP 433. The police forced their way in and found Barzie, but Sasu refused to cooperate. 3RP 433-34.

In July 2013, Sasu and Barzie had again broken up, but they ran into each other at a holiday party. 3RP 404, 434. Later, Barzie got drunk and called Sasu for a ride. 3RP 436. While Sasu was trying to carry Barzie into her apartment, Sasu noticed text messages on his phone from other women. 3RP 436. When she got upset about it, Barzie started punching and choking Sasu and hit her with a laptop computer. 3RP 437. When Sasu locked herself in the bathroom, Barzie shattered the door. Id.

Sasu curled up on the floor, but Barzie kicked her in the head, and did not stop beating her even when she started bleeding. Id. Barzie told her that he would kill her if the police came, and Sasu thought she was going to die that night. Id. Later in the night, when Barzie caught Sasu taking photos of her injuries, he punched her some more and held a screwdriver to her throat. 3RP 438.

Sasu finally broke up with Barzie in December 2013. 2RP 311. In July 2014, Sasu met Onoya Okonda at an annual holiday party and gave him her number. 3RP 449. As Sasu was leaving the party, Barzie stormed up and angrily accused her of cursing at Barzie's new girlfriend. 3RP 450. Barzie called Sasu a "dumb bitch," and said, "Keep playing with me, I'm gonna blow your head off." Id. He said he was going to go get his gun, and walked to his car, but Sasu's sister intervened and Barzie retreated. Id.

Soon afterward, Barzie telephoned Okonda and threatened to shoot him for talking to "my girl." 2RP 313-15. Okonda was not sure what girl Barzie meant. 2RP 316. Sasu and Okonda started dating about a month after the party. 3RP 452. Barzie sent text messages to Okonda claiming to be married to Sasu and issuing veiled threats. 3RP 454.

The night of October 17-18, 2014, Okonda went to a friend's Halloween party in Des Moines, even though he knew Barzie would probably be there. 2RP 317-18; 3RP 456-58. As Okonda was leaving, Barzie punched him in the face and pulled a handgun. 2RP 319. Barzie waved the gun around and said, "Whenever I see you, this is what I'm gonna do to you." Id. Okonda was scared. "I didn't want to die, you know," he later testified. 2RP 327.

Okonda showed up at Sasu's apartment at 2 o'clock in the morning, upset and shaking and saying that Barzie was crazy. 3RP 459, 464. They arranged a meeting with Barzie's family that same night in hope of calming the situation. 2RP 330-31; 3RP 461-62. When that seemed ineffective, Okonda and Sasu decided to call police. 2RP 331; 3RP 463. Okonda went to the Burien police station at four in the morning to give an excited report. 3RP 554-55.

A couple of weeks later, on November 7, 2014, Sasu and Okonda were at Sasu's apartment in the early evening when someone banged loudly at the front door. 3RP 465. It was Barzie and another man. Id. Okonda went upstairs to call the police because he was scared Barzie had come to carry out his previous threat to shoot him. 2RP 343. Barzie and Sasu argued, and Barzie

displayed a pistol. 3RP 465-66. "I thought he was in a crazy — he was like gonna just whip out a gun and shoot me," Sasu later testified. 3RP 466. Barzie said, "Well, I'm just gonna let you know the next time I see you and your boyfriend around in my territory, I'm gonna blow your head off." 3RP 467. Barzie and the other man left, and Sasu went upstairs to tell Okonda about the threat and to talk to police on the phone. 2RP 343-44; 3RP 488.

King County Sheriff's deputies found Barzie and the other man hiding in Barzie's car about three blocks away. 3RP 561-65. A very realistic pellet gun was found in Barzie's trunk. 4RP 575-76.

C. ARGUMENT

1. THE EXCEPTIONAL SENTENCE DOES NOT VIOLATE DOUBLE JEOPARDY.

Barzie's first challenge to his exceptional sentence is that it somehow violates double jeopardy because the jury considered the nature of three of Barzie's previous domestic-violence convictions that also counted on his offender score. He is wrong because while those convictions added points to the offender score by virtue of being prior felonies, the jury was allowed to consider the nature of the convictions — i.e., that they were domestic-violence offenses involving the same victim, spanning years — because those

aspects did not affect the offender score and were relevant to a pattern of abuse.

a. Additional Relevant Facts.

After finding Barzie guilty of domestic-violence felony harassment in Count 2, the jury was instructed to determine "[w]hether the crime is an aggravated domestic violence offense." CP 102; 5RP 782. To do so, the jury had to find beyond a reasonable doubt that "the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time." CP 104; 5RP 783. See RCW 9.94A.535(3)(h)(i); WPIC 300.06; WPIC 300.17. Additionally, the jurors were instructed that they "should consider the evidence presented to you throughout both phases of the trial." CP 105; 5RP 784. See WPIC 300.51.

The State offered six certified judgement-and-sentence documents from Barzie's prior domestic-violence convictions involving Sasu. Ex. 11-16; 5RP 770. Specifically:

- A May 2011 conviction for Domestic Violence Felony Violation of a Court Order, which listed Sasu as the subject of a resulting no-contact order. Ex. 11.

- A 2009 conviction for Domestic Violence Felony Violation of a Court Order, which listed Sasu as the subject of a resulting no-contact order. Ex. 12.

- Two 2008 convictions, for Domestic Violence Misdemeanor Violation of a Court Order and Harassment – Domestic Violence, which listed Sasu as the subject of a resulting no-contact order. Ex. 13.

- A 2008 conviction for Domestic Violence Felony Violation of a Court Order, which listed Sasu as the subject of a resulting no-contact order. Ex. 14.

- A 2008 conviction for Assault in the Fourth Degree – Domestic Violence from the city of Kent, which listed Sasu as the subject of a resulting no-contact order. Ex. 15.

- Two 2008 convictions for Violation of a No Contact Order and Theft from the city of Kent, which referenced a no-contact order protecting Sasu in the other Kent case. Ex. 16.

Barzie objected to the admission of the documents, arguing that they were "not necessary" and that no-contact-order violations are not probative to a pattern of abuse. 5RP 774-75. The trial court ruled that "a violation of a no-contact order can be circumstantial evidence of that psychological component of that issue," so the convictions were admissible. 5RP 778.

The State argued to the jury that Sasu's trial testimony showed that the abuse was prolonged, dating to their time in New York City, and the conviction documents served as "confirmation" of Sasu's testimony that the abuse had lasted years. Barzie argued that violations of no-contact orders were not meaningful evidence

and that there had been temporal breaks in the pattern of abuse. 5RP 787-88.

At sentencing, Barzie had an offender score of four for Count 2. CP 123. That reflected the other current offense of Felony Harassment (Count 3) and Barzie's three prior Felony Violation of a Court Order convictions from 2008, 2009 and 2011, which counted for one point each as prior felonies. CP 128; CP __ (Sub #70, Statement of Prosecuting Attorney); Ex. 11, 12, 14. Because of the age of the prior convictions, the fact that they were domestic-violence offenses did not affect the offender score. 5RP 798. See also RCW 9.94A.525(21)(a) (prior domestic violence violation-of-court-order offenses pled and proven after August 1, 2011, count as 2 points each on the offender score). If Barzie's felony and misdemeanor domestic-violence convictions had been more recent, he would have been "maxed out" and facing up to 60 months within the standard range. 5RP 798.

b. The Felony Convictions Were Properly Considered Because Their Nature Was Not Reflected In The Offender Score.

Under RCW 9.94A.535(3)(h)(i), a court may impose an exceptional sentence upon a jury finding that the current offense involved domestic violence and that "[t]he offense was part of an

ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time." Prior convictions "are already accounted for in calculating the offender score and should not be counted a second time in imposing a sentence outside the standard range." State v. Bartlett, 128 Wn.2d 323, 333, 907 P.2d 1196 (1995). "But while courts may not use the fact of a prior conviction alone to justify an exceptional sentence, there is no prohibition against drawing from the facts of a prior conviction, if they relate to the present case, to show extraordinary circumstances justifying a departure from the standard range." Id. "A reason offered by a sentencing court in imposing an exceptional sentence is acceptable if it considers factors other than those already considered in calculating the standard range for the offense." Id.

This Court reviews *de novo* whether the trial court's reasons justify the imposition of an exceptional sentence. RCW 9.94A.585(4); State v. Fowler, 145 Wn.2d 400, 405-06, 38 P.3d 335 (2002).

In Bartlett, the defendant received an exceptional sentence for the second-degree murder of his infant child. 128 Wn.2d at 327-28, 331. Bartlett contended that relying on the facts underlying

a prior conviction for assaulting another of his children, to show a special knowledge of the vulnerability of infants, was improper because the prior conviction affected his offender score. Id. at 331, 336. But our supreme court disagreed, saying that only the bare fact of the conviction was used in the offender score, not the nature of the offense as it related to the aggravating factor. Id. at 336.

This Court relied on Bartlett to reach a similar conclusion in State v. Souther, where a vehicular-homicide defendant complained that his exceptional sentence for the "special knowledge or increased awareness" aggravator was based on his prior alcohol-related convictions. 100 Wn. App. 701, 998 P.2d 350, review denied, 142 Wn.2d 1007 (2000). This Court rejected his argument that the sentencing court had considered the fact of the convictions alone. Id. at 717-18. To the contrary, the sentencing court had explained that the prior crimes "demonstrate the defendant's special knowledge of the consequences of driving under the influence of alcohol." Id. at 716.

There is little difference here, where Barzie's string of domestic-violence convictions, all involving Sasu, was relevant evidence of the pattern of abuse and the prolonged period of time. Barzie's offender score reflected only the fact that some of his prior

felonies were felonies; it did not reflect the *nature* of the offenses. As in Bartlett and Souther, the consideration of the nature of those offenses for purposes relevant to this aggravating circumstance falls directly within permissible uses. The consideration of the misdemeanor convictions was proper because they were not included in the offender score.

Still, Barzie argues that because the jury was not provided any of the "underlying facts" of the crimes then the jury was given nothing but the raw fact of the convictions to consider.[2] Brief of Appellant (BOA) at 9. But that is not true. The judgment-and-sentence documents show the dates of the crimes, the fact that the crimes were domestic violence, and that Sasu was the victim. There was nothing improper about admitting these convictions in support of the aggravating circumstance of a pattern of abuse. Barzie's argument should be rejected.

[2] The State apparently had offered the certifications of probable cause that accompanied each judgment and sentence, but Barzie objected and the trial court agreed with Barzie that only the judgment-and-sentence documents would be admitted. 5RP 770-71.

2. THE ERROR IN DEFINING A "PROLONGED PERIOD OF TIME" AS "LONGER THAN A FEW WEEKS" WAS HARMLESS BECAUSE THE EVIDENCE ESTABLISHED A PATTERN OF ABUSE SPANNING EIGHT YEARS.

For the bifurcated hearing on the aggravated circumstance, the trial court proposed a pattern instruction that defined a "prolonged period of time" to mean "more than a few weeks." CP 104. Barzie made no objection. 5RP 774. Barzie now seeks reversal of his exceptional sentence because our supreme court held recently that this instruction is an unconstitutional comment on the evidence. State v. Brush, 183 Wn.2d 550, 559, 353 P.3d 213 (2015). While the State concedes the error, it was absolutely harmless here because the evidence showed a pattern of abuse that lasted more than *eight years*, making the instruction devoid of prejudice.

Although judicial comments are presumed to be prejudicial, that presumption may be rebutted where the record shows that no prejudice could have resulted. Id. (quoting State v. Levy, 156 Wn.2d 709, 721-22, 132 P.3d 1076 (2006)). The Brush court concluded that the State could not rebut the presumption in that case because "[t]he abuse occurred over a time period just longer than a few weeks," so "defining a 'prolonged period of time' as

'more than a few weeks' likely affected the jury's finding on this issue." Id. at 559.

In contrast, the Levy court found no such prejudice where the trial court altered a pattern instruction providing the elements of first-degree burglary in order to expressly instruct the jury that the victim apartment in the case constituted a "building." 156 Wn.2d at 716. While finding that the trial court's tailoring of the pattern instruction amounted to an improper comment, the court declined to reverse Levy's burglary conviction because the question of whether the apartment was a building had never been challenged during the trial, and the absence of any challenge – along with common sense – compelled the conclusion that the jury could not have found the apartment to be anything other than a building. Id. at 726.

Barzie's case is much more like Levy than Brush. Unlike the evidence against the defendant in Brush, which showed no more than an eight-week period of abusive behavior, the evidence here was that Barzie started abusing Sasu in the earliest days of their long relationship, dating to the summer of 2006 in New York when Barzie beat Sasu unconscious.[3] That means that prior to Barzie

[3] In the State's closing argument for the aggravating factor, the prosecutor misstated Sasu's testimony as being that the abuse began in "2007 in New York." 5RP 786. The actual testimony was that Sasu was choked unconscious

threatening Sasu in November 2014, as charged in Count 2, he had been violently abusing her for *more than eight years*. The jury also heard of multiple episodes of domestic violence in the intervening years, and heard from Sasu that even as recently as July 2014 — the day she met Okonda — Barzie threatened her with a gun. 3RP 450.

Furthermore, like in Levy, Barzie barely challenged that the pattern of abuse was "prolonged," instead arguing that violating no-contact orders was irrelevant, and that there had been a temporal break in the pattern. Surely, an instruction that a "prolonged period of time" had to be at least three weeks long was completely meaningless in the context of the evidence the jury possessed here. The State has met its admittedly high burden of demonstrating a total lack of prejudice here — eight years of terrifying abuse is not a close call.

3. THE TRIAL COURT'S LEGAL CONCLUSION OF A "SUBSTANTIAL AND COMPELLING REASON" FOR AN EXCEPTIONAL SENTENCE WAS PROPER.

Finally, Barzie asks this Court to ignore repeated authority of our supreme court by reversing his exceptional sentence on the

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in the "summer of 2006" and Sasu moved to Seattle in August 2007. 3RP 414-15.

theory that a sentencing court's legal conclusion that an aggravating circumstance is a "substantial and compelling reason" for an exceptional sentence somehow violates the requirement that a jury must decide the facts supporting such a sentence. Barzie offers no real argument as to why our high court is wrong, and its precedent is binding on this Court. His argument is a nonstarter.

By statute, a Washington court may impose an exceptional sentence outside the standard range if it concludes that "there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. RCW 9.94A.535 provides that whenever an exceptional sentence is imposed, the court must set forth reasons for its decision in written findings of fact and conclusions of law.

Other than the fact of a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The "statutory maximum" means the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. Blakely v. Washington, 542 U.S. 296,

303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Thus, after Blakely, the required underlying factual bases for the aggravating factor are factual findings that must be determined by a jury; the trial judge is "left only with the legal conclusion of whether the facts alleged and found [are] sufficiently substantial and compelling to warrant an exceptional sentence." State v. Suleiman, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006) (citing State v. Hughes, 154 Wn.2d 118, 137, 110 P.3d 192 (2005), abrogated on other grounds by Washington v. Recuenco, 548 U.S. 212 (2006).

Importantly, "Blakely left intact the trial judge's authority to determine whether facts alleged and found are sufficiently substantial and compelling to warrant imposing an exceptional sentence" because that decision "is a legal judgment which, unlike factual determinations, can still be made by the trial court." Hughes, 154 Wn.2d at 126. In fact, "Blakely underscores the role of the judge in determining whether particular circumstances constitute substantial and compelling grounds to impose an exceptional sentence. State v. Alvarado, 164 Wn.2d 556, 568-69, 192 P.3d 345 (2008).

Nonetheless, Barzie baldly proclaims that our supreme court is wrong. But he makes no real argument for this, other than a

conclusory pronouncement that a "finding" of substantial and compelling reasons for exceptional sentence is a question of fact rather than a conclusion of law, because his legal dictionary says so. This is hardly the depth of analysis this Court should expect in an argument to ignore our supreme court, and this Court should decline to entertain it. See State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) ("[T]his court will not review issues for which inadequate argument has been briefed or only passing treatment has been made.").

Barzie turns to Black's Law Dictionary to define "question of fact" as anything that has not been "predetermined." BOA at 16. Applying this definition in this context would mean that any issue of controversy, and every matter requiring any degree of the court's discretion — e.g., even deciding whether a standard-range sentence is at the high or low end — is a question of fact. Meantime, Barzie glosses over his own dictionary's definition of a "question of law": "An issue to be decided by the judge concerning the *application* or interpretation of the law," and, "An issue that, although it may turn on a factual point, is reserved for the court." BOA at 16; Black's Law Dictionary (10th ed. 2014). That definition fits this context much more naturally, where a jury decides the

existence of an aggravating factor and the judge decides how it applies in sentencing.

In a Statement of Additional Authorities, Barzie offers the Supreme Court's decision this month in Hurst v. Florida, which held that Florida's death-penalty scheme violated the Sixth Amendment because it "required the judge alone to find the existence of an aggravating circumstance," while a death sentence must be based "on a jury's verdict, not a judge's factfinding." __ U.S. __, __ S. Ct. __, __ L. Ed., 14-7505, 2016 WL 112683, at *9 (Jan. 12, 2016). But Hurst should not affect our state's procedure for exceptional sentences because the finding of the existence of aggravating circumstances in Washington is up to the jury and never the judge, and Hurst did not blur the distinction between factfinding for "eligibility" for a death sentence (or an exceptional sentence) and the "selection" of deciding whether to impose it.

In Hurst, Florida's scheme gave the jury only an advisory role to recommend — or not — a death sentence, but "it does not make specific *factual findings* with regard to the *existence* of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge." Id. at *5 (emphasis added). "The trial court *alone* must find 'the facts ... [t]hat sufficient aggravating

circumstances exist'." Id. at *6 (quoting Florida statute) (emphasis in original).

In Florida, a jury could recommend mercy but the judge could find an aggravator and condemn the defendant anyway. Id. at *6. So "[Florida] cannot now treat the advisory recommendation by the jury as the necessary factual finding." Id. In Washington, the legal conclusion by a judge of substantial and compelling reasons for an exceptional sentence is not factfinding. The most a Washington judge can do is to *refuse* to impose an exceptional sentence despite the jury's finding of the existence of an aggravating circumstance, providing the "additional protection" that did not exist in Florida. See Hurst, 2016 WL 112683 at *6 (rejecting State's argument that judge was "additional protection."). A Washington judge cannot find an aggravating circumstance when the jury does not.

Barzie might try to interpret Hurst as pronouncing that the weighing of factors, rather than the finding of their existence, also lies within the province of the jury. But neither Hurst, nor the case it chiefly relies upon, Ring v. Arizona, so held. Both cases squarely and exclusively addressed the *factual finding* of the *existence* of aggravating circumstances. See Ring, 536 U.S. 584, 609, 122 S.

Ct. 2428, 153 L. Ed. 2d 556 (2002) ("The question presented is whether that aggravating factor may be found by the judge ... or whether the Sixth Amendment's jury trial guarantee ... requires that the aggravating factor determination be entrusted to the jury."); Hurst, 2016 WL 112683, at *6 ("As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of Ring, we hold that Hurst's sentence violated the Sixth Amendment.").

Moreover, the U.S. Supreme Court has long held that "the purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which *imposition* of the penalty is determined by a judge." Spaziano v. Florida, 468 U.S. 447, 448, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984) (emphasis added). Hurst overruled Spaziano only "to the extent [it] allows a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." Hurst, 2016 WL 112683, at *8. See also Hurst, 2016 WL 112683 at *9 (BREYER, J., concurring) (opining that the majority should have overruled Spaziano on the issue of judicial imposition of the death penalty generally.).

Capital punishment cases address "two different aspects of the capital decision-making process: the eligibility decision and the selection decision." Tuilaepa v. California, 512 U.S. 967, 971, 114 S. Ct. 2630, 129 L. Ed. 2d (1994). "To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." Id. at 971-72. "We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence" based on an "*individualized* determination on the basis of the character of the individual and the circumstances of the crime." Id. at 972 (emphasis in original).

Hurst did not eliminate that distinction, as evidenced by the Supreme Court's decision eight days later in Kansas v. Carr, which held that the Eighth Amendment does not require capital-sentencing courts in Kansas to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt. __ U.S. __, __ S. Ct. __, __ L. Ed., 14-449, 2016 WL 228342, at *8 (U.S. Jan. 20, 2016). In Carr, the high court again acknowledged a distinct "eligibility phase" and a "selection phase,"

and Justice Scalia wrote for the eight-member majority that "we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination (the so-called "selection phase" of a capital-sentencing proceeding)." Id. "...[T]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained." Id.

"It *would* be possible, of course, to instruct the jury that *the facts establishing* mitigating circumstances need only be proved by a preponderance." Id. (emphasis in original). But if the mitigating-factor determination were divided into its "factual component and its judgmental component, and the former to be accorded a burden-of-proof instruction, we doubt whether that would produce anything but jury confusion." Id. This should silence any argument that Hurst has any effect on our state's system for determining exceptional sentences, which has a similar two-part eligibility-phase and selection-phase process.

With all that said, once our supreme court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by our supreme court. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Our state supreme court has held

time and again that a judicial determination of a substantial and compelling reason for an exceptional sentence, based on an aggravating factor found by a jury, is a *legal conclusion* that does not violate the Sixth Amendment requirements of Blakely, *et. al.* Until our supreme court decides that its precedent is wrong — in light of Black's Law Dictionary or Hurst, or anything else — this Court is bound to adhere to its authority, and Barzie's argument fails.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Barzie's judgment and sentence.

DATED this 25TH day of January, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Sarah Hrobsky, the attorney for the appellant, at Sally@washapp.org, containing a copy of the BRIEF OF RESPONDENT in State v. Peterson Barzie, Cause No. 73350-8, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 25 day of January, 2016.

Name:
Done in Seattle, Washington